

Darmon Graves (“Graves”) was convicted in Vigo Superior Court of Class A felony robbery resulting in serious bodily injury. On appeal, he raises the following issues, which we restate as:

- I. Whether the trial court improperly denied his jury instruction;
- II. Whether the trial court abused its discretion in considering and weighing aggravating circumstances; and,
- III. Whether his sentence is inappropriate in light of the nature of the offense and character of the offender.

We affirm.

Facts and Procedural History

On February 26, 2006, Graves was driving to St. Louis in a van with three other people to record hip hop music and to buy gold teeth. While waiting at a stop light in Terre Haute, Graves motioned to Kwame Williams (“Williams”) to ask him for directions. Williams and Graves pulled over to talk, and they decided that Graves would follow behind Williams to an apartment complex where they could all smoke marijuana.

While following behind Williams, Graves proposed to his fellow travelers that they rob Williams. The four occupants of the van agreed to convince Williams to join them in the van to smoke, and then aim a gun at him, strip him naked, and force him out of the van. Both vehicles pulled into the parking lot behind an apartment complex so that the driver-side windows were facing one another. Delvonte Moore (“Moore”), an occupant in Graves’s van, realized that Williams intended to stay in his own vehicle to smoke. At that point, Moore got out of the van, approached Williams’s car and pointed his pistol in Williams’s face. Graves immediately sprang from the van and grabbed

Williams through the window. Graves and Moore began pulling Williams out of the car by his legs. As Williams attempted to struggle free, Graves told him, “Oh, no, mother f***er, you’re not going anywhere.” Tr. p. 484.

When Moore discovered that Williams had a gun in his sweatshirt, he shot him twice in the back, paralyzing Williams from the navel down. Graves reached into the sweatshirt to take Williams’s gun, which he later sold for fifty dollars and some cocaine. Graves jumped back into his van, leaving Williams bleeding on the ground, and drove all the way back to Indianapolis. Graves then fled to Georgia, and Moore fled to Virginia.

On March 15, 2005, the State filed an amended information charging Graves with robbery resulting in serious bodily injury. A jury trial commenced on August 8, 2006, which convicted Graves as charged. On September 6, 2006, the trial court conducted a sentencing hearing. The court found two aggravating circumstances and no mitigating circumstances, and it sentenced Graves to forty years, a ten-year enhancement. Graves now appeals. Additional facts will be provided as necessary.

I. Jury Instructions

Graves contends that the trial court abused its discretion in refusing to give one of his tendered jury instructions. Specifically, Graves requested that the jury be instructed as follows:

In order to find the defendant guilty as an accomplice in the crime of armed robbery resulting in serious bodily injury, a Class A Felony, you must find that he had the specific intent that Kwame Williams be shot, or otherwise injured, when he knowingly or intentionally aided, induced, or caused the principal to commit the crime of armed robbery resulting in serious bodily injury.

Appellant’s App. p. 29.

The manner of instructing a jury is left to the sound discretion of the trial court, and we review its decision thereon only for an abuse of that discretion. When the trial court refuses a tendered instruction, we must consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Jury instructions are to be considered as a whole and in reference to each other. Error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights.

Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006) (citations omitted).

Graves contends that his proffered jury instruction was necessary to explain to the jury accomplice liability. However, Graves's instruction is an incorrect statement of the law. In Johnson v. State, 490 N.E.2d 333 (Ind. 1986) our supreme court wrote:

Appellant would have us limit the scope of accessory liability to a confederate's actions which were expressly discussed and agreed upon when they planned the crime. However, an accomplice is criminally liable for the acts done by his confederates which were a probable and natural consequence of their common plan, even though the acts may not have been originally intended as part of their plan.

Id. at 334. Serious injury to Williams was certainly a probable and natural consequence of robbing him at gunpoint. It was unnecessary for Graves to have had the specific intent to seriously harm Williams in order for the jury to find him guilty of robbery resulting in serious bodily injury. Because Graves's proffered jury instruction is contrary to Indiana law, we conclude the trial court did not abuse its discretion in refusing to tender it.

II. Aggravating Circumstances

Graves also challenges the trial court's sentence by first contesting its consideration and weighing of aggravating circumstances.¹ We bear in mind that sentencing determinations, including whether to adjust the presumptive sentence,² are within the discretion of the trial court. See Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances, it must do the following: (1) identify all significant aggravating or mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

At sentencing, the trial court found that Williams's injury, which had rendered him a paraplegic bound to a wheelchair, was an aggravating nature and circumstance of the crime. Graves contends that this circumstance was improper because the extent of Williams's injury had not been admitted or proven beyond a reasonable doubt to a jury, and therefore violated his constitutional right to a jury trial under Blakely v. Washington, 542 U.S. 296 (2004).

Facts that are admitted by the defendant do not require a jury's sanction or approval to be used as aggravating circumstances. White v. State, 846 N.E.2d 1026, 1035 (Ind. Ct. App. 2006), trans. denied. At the sentencing hearing, in discussing Williams's condition, Graves stated, "That man can't walk anymore." Sent tr. p. 31. He

¹ Graves also contends the trial court abused its discretion in failing to assign mitigating weight to the proffered factor that Williams induced the violence against him. He maintains that Williams's invitation to smoke marijuana with him induced Graves and Moore to drag him from his car, rob him, and shoot him in the back. We find such argument wholly without merit.

² The amended versions of Indiana Code §§ 35-50-2-5, -6, and -7 (2005) reference the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004). Since Graves committed the crime in question on February 26, 2005, before the effective date of the amendments, we apply the versions of the statutes then in effect and refer instead to the presumptive sentences. See Ind. Code §§ 35-50-2-5, -6, and -7 (2004).

further said he was remorseful for Williams's son whose life was changed because his male role model was "crippled." Id. at 33. Graves also told Williams that he would pray for a miracle to make Williams walk again. Id. Given these defendant admissions about Williams's paraplegic state, the trial court did not violate Blakely in considering the nature and circumstances of the crime as an aggravating factor.

Graves further contends that this aggravating factor is invalid as it had already been considered in enhancing the robbery from a Class C felony to a Class A felony because the crime had resulted in serious bodily injury. Graves is correct that a material element of a crime may not also constitute an aggravating circumstance. Ellis v. State, 707 N.E.2d 797, 804 (Ind. 1999). The trial court may, however, enhance a sentence on the basis of the particularized circumstances of the criminal act so long as the court explains why those circumstances warrant the enhancement. Id.

In Lang v. State, the defendant similarly claimed that the serious nature of the injuries to the victim had already been considered as the basis for raising the offense from a Class C felony to a Class A felony and therefore should not have been considered as an additional aggravating circumstance. 461 N.E.2d 1110, 1113 (Ind. 1984). Our supreme court stated, "We have repeatedly held that our statute expressly does not limit the matters that the trial court may consider in determining a sentence. The serious nature of the injuries to the victim in this case was one of the specific facts which the court could consider as an aggravating circumstance." Id.

The "nature and circumstances" of a crime is a proper aggravator. See Ind. Code § 35-38-1-7.1. Here, the trial court explained that it found the nature and circumstances

of the crime aggravating because Williams had been rendered a paraplegic as a result of the shooting. Williams was unable to graduate from Indiana State University as a result of his injury, and he is permanently confined to a wheelchair. Although serious bodily injury can be severe, it does not always end in such a permanent and life altering disability as it did in this case. Therefore, the severe impact on the victim is not a material element of the offense of robbery resulting in serious bodily injury. See e.g., Martin v. State, 784 N.E. 2d 997 (Ind. Ct. App. 2003) (holding that trial court, in citing extreme brutality of crime, properly considered nature and circumstances of crime as aggravating factor in sentencing defendant for conviction of battery resulting in serious bodily injury because extreme brutality was not element of crime).

Graves also contends that the trial court afforded too much aggravating weight to his criminal history. “[T]he extent, if any, that a sentence should be enhanced turns on the weight of an individual’s criminal history.” Duncan v. State, 857 N.E.2d 955, 959 (Ind. 2006). “This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability.” Id. (quoting Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006)).

At the sentencing hearing, the trial court found Graves’s 1999 conviction for possession of cocaine and subsequent probation revocation relevant. Graves contends that this was in error, as it does not justify an enhancement for his new robbery sentence. We disagree. First, from the record one can infer that Graves agreed to follow Williams to rob him of his marijuana. Secondly, Graves stole Williams’s gun in the commission of

the offense, which he and Moore used to barter for cocaine. Tr. p. 619. Because of this crime's relation to Graves's continuing substance abuse and addiction, the trial court did not abuse its discretion in using Graves's felony conviction for possession of cocaine as an aggravating circumstance.

III. Appropriate Sentence

Graves next contends that his sentence is inappropriate in light of the nature of the offense and character of the offender. A defendant may challenge the appropriateness of his sentence in any case where the trial court exercises discretion upon sentencing the defendant. Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Id. (citing Ind. Appellate Rule 7(B)). A trial court may rely upon only one aggravating circumstance to support an enhanced sentence. Hollen v. State, 761 N.E.2d 398 (Ind. 2002).

On the date Graves committed this crime, Indiana Code section 35-50-2-4 (2004) provided that “[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.” Graves was sentenced to forty years, and therefore, he did not receive the maximum sentence for a Class A felony, but a sentence enhanced beyond the presumptive sentence by ten years.

Regarding Graves's character, the trial court relied on the fact that Graves has a previous Class D felony conviction for possession of cocaine. The presentence

investigation report also indicates that Graves has abused methamphetamine, cocaine, ecstasy, PCP, marijuana and alcohol since the age of thirteen. In fact, Graves used the proceeds of this robbery to support his cocaine habit.

Regarding the nature of the offense, we also find it relevant that the victim was dragged from his car and shot in the back, rendering him a paraplegic. Furthermore, after the shooting, Graves drove off in his van, leaving Williams for dead. Graves then fled to the state of Georgia. Given these facts, we conclude that Graves's enhanced sentence of forty years is not inappropriate in light of the nature of the offense and character of the offender.

Conclusion

The trial court did not abuse its discretion in refusing Graves's proffered jury instruction. The trial court further did not abuse its discretion in considering and weighing the aggravating circumstances, and Graves's forty-year sentence is not inappropriate in light of the nature of the offense and character of the offender.

DARDEN, J., and KIRSCH, J., concur.